Supreme Court, U.S.
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No. 98-1845

IN THE

# Supreme Court of the United States

STATE UNIVERSITY OF NEW YORK,
COLLEGE AT NEW PALTZ, *et al.*,

*Petitioners,*

*v.*

DR. JANICE W. ANDERSON, PH.D.
and UNITED STATES OF AMERICA,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENT DR. JANICE W. ANDERSON

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## QUESTION PRESENTED

Whether Congress's abrogation of the States' Eleventh Amendment immunity in the Equal Pay Act of 1963, 29 U.S.C. § 206(d), falls within Congress's power under Section 5 of the Fourteenth Amendment.

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This brief is submitted on behalf of Dr. Janice W. Anderson ("Anderson") in opposition to the petition seeking a writ of certiorari.

## STATEMENT OF THE CASE

Anderson is employed by the State University of New York College at New Paltz ("SUNY New Paltz" or "College") as an Associate Professor in the Communication and Media Department. Since her initial employment in 1984, SUNY New Paltz has paid Anderson significantly less than her male counterparts in the same department, who have the same academic rank, the same or similar qualifications, and who teach the same or similar subjects. Anderson teaches the same number of courses as each of her male colleagues, has equivalent academic research accomplishments, and performs the same amount of service to the College outside of teaching. (Pet. App. 31a-33a).

The only real difference between Anderson and her male colleagues is that she has always received a much lower salary for equal work.

In the early 1990s, Anderson filed an internal complaint at the College seeking to remedy the unequal salary. (Pet. App. 33a). That process and the subsequent litigation revealed that the College knew she was underpaid and even made written admissions that she was underpaid when compared to her male colleagues. Still, SUNY New Paltz did not correct the inequity. (Pet. App. 33a).

This suit followed, seeking to ensure that Anderson be paid the same salary as her male colleagues that perform substantially the same work.

This case challenges the pattern of sex-based wage discrimination at SUNY New Paltz pursuant to the Equal Pay Act, 29 U.S.C. § 206(d)(1) ("Equal Pay Act"), Title VII of the 1964 Civil Rights Act, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII") and the New York State Executive Law §§ 290, *et seq.* ("NYS Human Rights Law"). (Pet. App. 28a).

At the close of discovery, the defendants moved for summary judgment on all issues. Anderson cross-moved for summary judgment on the Equal Pay Act claim. With a decision dated December 8, 1997, the District Court denied both parties' motions for summary judgment on the Equal Pay Act claim (Pet. App. 19a); however, the District Court granted the defendants' motion for summary judgment dismissing the claims under Title VII and the Human Rights Law. The District Court dismissed the Title VII claim because it found the plaintiff's statistical expert report did not adequately establish intent. (Pet. App. 16a).

The defendants filed an appeal from the failure of the Court to grant the motion for summary judgment on the one remaining claim under the Equal Pay Act alleging that the District Court erred in finding federal court jurisdiction under the Equal Pay Act against the State defendants. The plaintiff filed a cross-appeal from the Court's dismissal of her Title VII claim on the ground that inexplicably the District Court never addressed the defendants' admissions showing intent. Anderson's cross-appeal was dismissed by the Court of Appeals as premature. (Pet. App. 5a n.1).

Thus, the sole issue before the Court of Appeals was whether the Eleventh Amendment to the Constitution bars suit in federal court by the private party plaintiff under the federal Equal Pay Act.

The Court of Appeals affirmed the District Court's denial of SUNY New Paltz's motion to dismiss on Eleventh Amendment grounds. (Pet. App. 1a-10a). Applying the two-part test enunciated in *Seminole Indian Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996), the Court of Appeals ruled that the Equal Pay Act contains a clear statement of Congress's intent to abrogate the States' Eleventh Amendment immunity. (Pet. App. 6a). The Court also held that the Equal Pay Act is a valid exercise of Congress's power under Section 5 of the Fourteenth Amendment to abrogate Eleventh Amendment immunity. (Pet. App. 7a-10a). The Court explained that the Equal Pay Act's burden-shifting scheme — in which plaintiffs must show that the employer pays different wages to employees of the opposite sex for equal work, and then defendants must show that the differential is based on any factor other than sex — "reaches only those wage disparities for which the employee's sex provides the sole explanation." (Pet. App. 9a). The Court concluded that the Equal Pay Act is "reasonably tailored to remedy intentional gender-based wage discrimination." (Pet. App. 9a). In so ruling, the Second Circuit Court of Appeals joined every other court of appeals that has addressed this issue. *See Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), *cert. dismissed*, 119 S. Ct. 1161 (1999); *Varner v. Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998), *petition for cert. pending*, No. 98-1117; *Timmer v. Michigan Dep't of Commerce*, 104 F.3d 833, 838-839 (6th Cir. 1997); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169, 1171 (4th Cir. 1977); *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148, 155 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977).

## REASONS FOR DENYING THE WRIT

The Court of Appeals' ruling that the Equal Pay Act validly abrogated the States' Eleventh Amendment immunity is correct and consistent with the decisions of this Court and every other court of appeals that has addressed the question. Accordingly, further review is unwarranted.

A. Petitioners argue that under *Seminole Indian Tribe of Florida v. Florida*, *supra*, and *City of Boerne v. Flores*, 521 U.S. 507 (1997)), the federal courts lack subject matter jurisdiction over Anderson's Equal Pay Act case. That argument must fail.

In *Seminole*, the Supreme Court held, in relevant part, that before Congress may abrogate a State's Eleventh Amendment sovereign immunity, legislation must pass a two-part test:

> [f]irst, whether Congress has unequivocally expressed its intent to abrogate . . . immunity; and second, whether Congress has acted pursuant to a valid exercise of power.

*Seminole*, *supra*, 517 U.S. at 55.

This Court has recently reaffirmed that the Fourteenth Amendment remains a valid source of Congressional power for abrogating sovereign immunity. *Alden v. Maine*, 67 U.S.L.W. 4601, 4615 (1999), citing *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) and *Seminole*, *supra*.

Applying *Seminole*, the test in this case is did Congress unequivocally express its intent to abrogate the States' sovereign immunity when extending the Equal Pay Act to the States in 1974, and whether Congress had the power to do it under the Fourteenth Amendment.

The first part of the *Seminole* test is straightforward. As petitioners concede, every court of appeals that has addressed the question specifically held that the 1974 Congressional amendments extending the coverage of the Equal Pay Act to the States constitutes a specific unequivocal statement of Congress's intent to abrogate sovereign immunity. *Reich v. New York*, 3 F.2d 581, 590-591 (2d Cir. 1933), *cert. denied*, 510 U.S. 1163 (1994)[1] *Mills v. State of Maine*, 118 F.3d 37, 42 (1st Cir. 1997); *Abril v. Virginia*, 145 F.3d 182, 186 (4th Cir. 1998); *Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), *cert. denied*, 119 S. Ct. 1161 (1999); *Timmer v. Michigan Dept. of Corrections*, 104 F.3d 833, 837 (6th Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1391 (*en banc*, 9th Cir. 1993), *cert. denied*, 510 U.S. 946; *Brinkman v Department of Corrections*, 21 F.3d 370 372 (10th Cir. 1994); *Aaron v. Kansas*, 115 F.3d 813, 814-815 (10th Cir. 1997). Indeed, the petitioners concede in their brief that Congress met the first prong of the *Seminole* test in extending the Equal Pay Act to the State in 1974. (*See* Petitioners' Brief at p. 11.)

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1. In *Close v. New York*, 125 F.3d 31, 39 (2d Cir. 1997), the Second Circuit held that *Reich* is no longer good law in light of *Seminole* because of the *second* part of the two-part *Seminole* test. However, as the *Close* case reaffirms, the 1974 amendments to the Equal Pay Act make it manifestly clear that Congress stated unequivocally its intent to abrogate the state's sovereign immunity. *See Close v. New York*, *supra*, 125 F.3d at 39.

The second prong of the *Seminole* test requires more analysis.

The question on the second prong of the test is whether the Fourteenth Amendment may be inferred as the source of Congressional power absent Congress's explicit reliance. In amending the Equal Pay Act to permit suits by private citizens against a state employer, Congress did not recite that the Fourteenth Amendment was its source of power.

There is no real dispute that Congress need not recite explicitly its source of power in passing legislation. *EEOC v. Wyoming*, 460 U.S. 226, 243-244 n.18 (1983). The test is whether Congress *actually* has the power to act under the Fourteenth Amendment, not whether Congress explicitly stated it was acting pursuant to that power. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Katzenbach v. Morgan*, 384 U.S. 641 (1966).

Before *Seminole*, several Circuit Courts ruled explicitly that the Equal Pay Act could be seen as legislation to enforce the Fourteenth Amendment because it was passed to remedy sexual discrimination in pay. *Usery v. Allegheny County Inst. Dist.*, 544 F.2d 148 (3rd Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); *Usery v. Charleston County Sch. Dist.*, 558 F.2d 1169 (4th Cir. 1977); *Marshall v. Owensboro-Daviess County Hosp.*, 581 F.2d 116, 119-120 (6th Cir. 1978); *Marshall v. City of Sheboygan*, 577 F.2d 1 (7th Cir. 1978).

Each of these cases arose after the Supreme Court ruled in *National League of Cities v. Usery*, 426 U.S. 833 (1976), that the Tenth Amendment prohibited the application of the Fair Labor Standards Act ("FLSA") to the States.

*Garcia v. San Antonio Metro Transit Authority*, 469 U.S. 528 (1985), overruled *National League of Cities*. But in the ten-year interim period, between *National League of Cities* and *Garcia*, many States tried unsuccessfully to avoid coverage under the Equal Pay Act by arguing that, like the FLSA, suits under the Equal Pay Act were barred both by the absolute bar of the Tenth Amendment and the sovereign immunity bar of the Eleventh Amendment. In each of those cases, the States argued that since the Equal Pay Act was added as a companion statute to the FLSA, cases interpreting the applicability of the Tenth and Eleventh Amendments to the FLSA were equally applicable to the Equal Pay Act. All of these efforts failed as each Circuit that addressed the issue held that neither the Tenth *nor* the Eleventh Amendment barred suit in Federal Court under the Equal Pay Act.

After *Seminole*, some States, including New York, the petitioner here, have renewed the effort to avoid Equal Pay Act claims in federal court, revisiting the previously rejected argument that the Equal Pay Act does not remedy wrongs protected by the Equal Protection Clause. Each of the Circuit Courts that have addressed the question post *Seminole* have held, *without exception*, that consistent with what the Second Circuit held in this case, the Equal Pay Act that was passed to address unequal treatment based on gender, was appropriately passed either directly or *by inference* pursuant to the Fourteenth Amendment. *See Ussery v. Louisiana*, 150 F.3d 431, 435 (5th Cir. 1998), *cert. dismissed*, 119 S. Ct. 1161 (1999); *Timmer v. Michigan*, 104 F.3d 833 (6th Cir. 1997) *Varner v. Illinois State Univ.*, 150 F.3d 706, 709-717 (7th Cir. 1998), *petition for cert. pending*, No. 98-1117.

Each of these cases apply the same analysis. As the Supreme Court has held, Congress acts within its authority under the Fourteenth Amendment if the Court can perceive a basis upon which Congress might predicate a judgment that the state action "constituted an invidious discrimination in violation of the Equal Protection clause." *Katzenbach v. Morgan*, 384 U.S. 641, 656 (1966).

Each Equal Pay Act case, including this one, starts with the bedrock position that Congress is given wide latitude to passing legislation to remedy violations of the Equal Protection Clause.

This Court has previously held that sex discrimination in employment is a form of discrimination protected by the Equal Protection Clause. *See Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a case upholding Title VII with its ban on sex-based employment discrimination.

The Equal Pay Act is a quintessential civil rights law, having as its aim the achievement of workplace equality for women. According to its legislative history, the Equal Pay Act was enacted to address the problem that relative wages in "many segments of American industry ha[ve] been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same." S. Rep. No. 176, 88th Cong., 1st Sess., 1 (1963). In enacting the Equal Pay Act, Congress sought "to remedy what was perceived to be a serious and endemic problem of employment discrimination" — the disparity in wages paid to men and women doing the same work. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974).

It is therefore fitting that in a unanimous ruling this Court recently stated that the Equal Pay Act is part of a larger statutory scheme aimed at protecting employees from discrimination, along with Title VII. *McKennon v. Nashville Banner Pub'l Co.*, 513 U.S. 352, 357 (1995). The *McKennon* Court characterized this network of laws, which includes the Equal Pay Act, as "part of an ongoing congressional effort to eradicate discrimination in the workplace, reflect[ing] a societal condemnation of invidious bias in employment decisions." *Id.*

Here, the sole purpose of the narrowly drawn Equal Pay Act is to address historic inequality between the salaries of men and women who performed the same job. *See generally Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974). It is hard to conceive of a more direct connection between a statute and the express purpose of the Equal Protection Clause, since the sole purpose of the statute is to remedy disparate salaries based on gender.

Thus, under the Supreme Court's test for evaluating whether a Congressional enactment fits within Congress's broad power to remedy invidious discrimination covered by the Equal Protection Clause, the Equal Pay Act easily passes muster.

Since the decision of the Court of Appeals is consistent with this Court's prior holdings and consistent with the holdings of all other courts of appeals, further review is not warranted.

B. The State defendants argue that *City of Boerne v. Flores*, *supra*, somehow mandates a different result. Petitioners argue that the Equal Pay Act allows recovery

without the proof of intent; thus, it fails the proportionality and congruity test under *Boerne*. This reliance is misplaced. In *Boerne*, this Court held that Congress could not rely on the Fourteenth Amendment to declare what constitutes a constitutional violation. *Boerne* simply held that Congress's power to enforce the Fourteenth Amendment to remedy wrongs protected by it does not authorize it to establish new substantive constitutional rights.

In overturning the act of Congress at issue in *Boerne*, the Court made clear that it was not modifying its earlier cases that enable Congress to pass statutes that remedy violations of the Equal Protection Clause itself or that serve the broader purposes of the Equal Protection Clause. The Court in *Boerne* specifically noted that:

> Legislation [enacted under section five of the Fourteenth Amendment] which defers or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is itself not unconstitutional and intrudes into legislative spheres of autonomy previously reserved to the States.

*City of Boerne v. Flores*, *supra*, 521 U.S. at 518.

To support this proposition the Court cited to *Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976), a case holding that Congress had the power under the Fourteenth Amendment to pass Title VII despite the Eleventh Amendment argument of sovereign immunity. Since *Boerne* relied expressly on *Fitzpatrick*, a case upholding an act of Congress which prohibits sex discrimination, it cannot be

seriously argued that *Boerne* stands for the proposition that the application to the States of the Equal Pay Act, a statute limited *exclusively* to prohibiting sex discrimination in pay, is unconstitutional.

Even if this Court engages in the balancing and proportionality analysis urged by the petitioners here, it should quickly conclude that when compared with Title VII's broad reach, the Equal Pay Act is narrowly tailored to address the specific ill of sex discrimination in pay.

Title VII is a much broader and invasive statute than the Equal Pay Act. It covers all forms of employment discrimination including pay, benefits, leave provisions, hirings, firings, promotions, and other forms of benefits and working conditions. *See* 42 U.S.C. §§ 2000e-2(a)(2), 2(d), 3(a) and 3(b). Title VII also affords wide latitude in fashioning relief, including reinstatement orders, orders requiring promotions, creation of training programs, and a whole range of other affirmative relief. *See, e.g., Local 28 of the Sheet Metal Workers Assn. v. EEOC*, 478 U.S. 421 (1986). This is in addition to a full range of make whole remedies, including back pay, front pay, attorneys' fees, and compensatory damages. *See* 42 U.S.C. § 2000e.

By contrast, the Equal Pay Act is narrowly drawn to cover only discrimination in pay meaning that any award is limited solely to making up the difference in pay between the men and the women. It also requires only that an employer pay men and women equally for substantially equal work. *See, e.g., Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995). That is quite different from Title VII, which permits a recovery if an employee can show they were paid differently than employees in similar or comparable positions. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

The most that can be said is that the Equal Pay Act remedies allowing for back pay and an order to pay an equal salary in the future, are somewhat redundant of Title VII remedies for the same conduct. Surely, the fact that remedies in one statute overlap remedies in a similar, constitutional statute, does not create a constitutional question. Despite their protests to the contrary, petitioners have utterly failed to show any case authority for their novel proposition that overlapping remedies creates a constitutional infirmity.

It is simply wrong for the petitioners to argue that the Equal Pay Act creates greater exposure of the State than Title VII. One need only look at the statute to see the absurdity of that position.

If Congress had the power to pass Title VII under the Fourteenth Amendment, it surely had the power to pass the Equal Pay Act with its narrow focus, more limited impact and sharp connection to rights protected by the Equal Protection Clause.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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